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JOSEPH F. SPANIOL, JR.
CLERK

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WALTER PENDLETON,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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3+PP

QUESTION PRESENTED

1. Whether O.C.G.A. § 40-6-392(b)(4) is improperly construed as creating a conclusive presumption of guilt as to a finding of a blood alcohol reading of 0.12 percent, and therefore creates a constitutionally impermissible presumption of guilt so as to violate minimum due process standards as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and which interpretation directly conflict with this Court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)?

PARTIES TO THE PROCEEDINGS

Walter Pendleton -Petitioner

State of Georgia -Respondent

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Constitutional Provision and Statutes:

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OPINION BELOW

The opinion of the Court of Appeals of the State of Georgia affirming the conviction of the trial court is reported at Pendleton v. State, 184 Ga. App. 358 (1987). It is reproduced in the Appendix, beginning at page A-1.

The order of the Supreme Court of the State of Georgia denying a petition for writ of certiorari is without opinion and is not reported. It is reproduced in the Appendix at page A-14.

JURISDICTION OF THIS COURT

This is a case involving a State Court decision of a federal question which conflicts with applicable decisions of the United States Supreme Court. The opinion of the Court of Appeals of the State of Georgia was rendered on September 8, 1987. A timely

petition for rehearing filed by the petitioner was denied by order of September 29, 1987, reproduced in the Appendix at page A-12.

A petition for writ of certiorari was filed in this case and was denied by order of the Supreme Court of the State of Georgia dated October 28, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution states as follows:

"No State shall make or enforce any law which shall . . . deprive any person

of life, liberty, or property, without due process of law . . .."

STATEMENT OF THE CASE

It has been the petitioner's contention that the trial court erred in its charge to the jury on the effect of a finding of a blood alcohol reading of 0.12 percent.

The trial court's charge explaining the presumptions codified in O.C.G.A. § 40-6-392(b)(4) instructed the jury that:

"if you find that there was 0.12 percent gram weight of alcohol in the person's blood while driving, then that in itself is no longer a presumption, but is what we -- what is called a fact -- a per se fact; that is in and of itself. It is correct and not rebuttable.

You the Jury have no authority to reject that and must accept it as a fact that the person was driving with an unlawful blood alcohol content." Trial Transcript (Tr.) 281.

On July 24, 1987, the jury returned its verdict whereby it found the Petitioner guilty of driving under the influence, driving with a blood alcohol content of .12 or greater, and failure to maintain a proper lane.

Petitioner appealed to the Court of Appeals of the State of Georgia contending among other things that the instruction was contrary to the law because it took from the jury their fact finding function by establishing a conclusive presumption which relieved the state of the burden of proving every element of

the offense beyond a reasonable doubt; in that, the trial court's instructions to the jury to find the defendant guilty of violating O.C.G.A. § 40-6-391(a)(4) if they found 0.12 percent blood alcohol content in his blood at the time he was driving completely ignores the fact that there are defenses which exist and which came out at trial and effectively negates the charge to the jury on the element of intent.

The Court of Appeals of the State of Georgia rejected this contention and affirmed the conviction of the trial court in a decision rendered on September 8, 1987 and denied a petition for rehearing on September 29, 1987.

Petitioner's application to the Supreme Court of the State of Georgia for

a writ of certiorari again contending that his due process rights were violated by the trial court's jury instruction creating a conclusive presumption of guilt was also denied.

REASON FOR GRANTING THE WRIT

The presumption created by the instruction was "conclusive", that is, not technically a presumption at all, but rather an irrebuttable direction by the court to find intent and impaired driving ability once convinced of the facts triggering the presumption.

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re

Winship, 397 U.S. 358, at 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

Under Georgia law every crime must be committed with the requisite intent. The Georgia trial court judge stated as such in his charge to the jury. The trial judge instructed the jury as follows:

"Intent is an essential element of any crime, and it must be proved by the State beyond a reasonable doubt." Tr. 273.

In response to the petitioner's contention that the verdict is contrary to law because the trial court failed to charge the jury on intent, the Court of Appeals stated, "we need only point out that the trial court did charge on intent". (See A-10)

However, the inclusion of the general instruction did not dissipate the constitutional infirmity of the instruction as to count two which was that if the jury found 0.12 percent by weight of alcohol then it is "not rebuttable" and they have "no authority to reject that . . . [but] must accept it as a fact that the person was driving with an unlawful blood alcohol content" in violation of OCGA § 40-6-391(a)(4).

The contradiction produced by giving the irreconcilable instructions "[could easily have led a reasonable juror to resolve] the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption." Francis v.

Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

Thus, the question before this court is whether the statutory presumptions as put forth by the trial court's instruction to the jury had the effect of relieving the state of the burden of proving every element of the crime; imparticular, the critical question of petitioner's state of mind.

In this case, if the jury found 0.12 percent blood alcohol content the jury could not rebut that and must find him guilty of driving with an unlawful blood alcohol content. The element of intent was effectively eliminated as an ingredient of the offense. Additionally, proof which tended to establish that

the Petitioner was not under the influence of alcohol was also foreclosed.

Conclusive presumptions conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, and it invades the fact finding function which in a criminal case the law assigns solely to the jury. The instructions announced to the jury in this case had exactly this consequence. Upon finding proof of 0.12 blood-alcohol content they were directed to find against the defendant on the element of intent.

The state was thus not forced to prove "beyond a reasonable doubt every fact necessary to constitute the crime charged, and the defendant was deprived

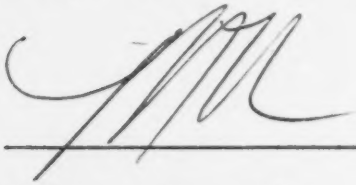
of his constitutional rights as guaranteed to him by the Fourteenth Amendment" and as explicitedly set forth in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)

CONCLUSION AND PRAYER

The Fourteenth Amendment right to due process of law is a fundamental right, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed by the trial court's jury charge. Review should be granted, and upon review, this case should be remanded for trial in accordance with those issues discussed here.

This the 22nd day of December, 1987.

Respectfully submitted,



Melvin S. Nash

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.3 of the Rules of this Court three copies of this petition for writ of certiorari were served on counsel for the opposing party, by placing them in the United States mail, first class

postage prepaid, addressed as follows:

Mr. Philip M. Goldstein
Assistant Solicitor
State Court of Cobb County
Post Office Box 649
Marietta, Georgia 30061

This the 22nd day of December, 1987.

MELVIN S. NASH
Attorney for Petitioner

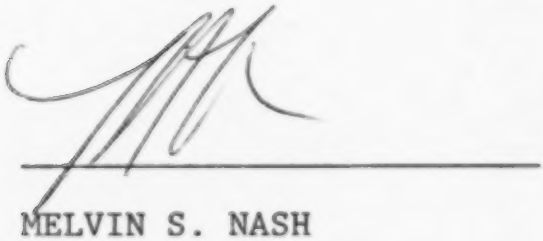
CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.4(c) of the Rules of this Court, and given that 28 U.S.C. § 451 may be appli-

cable, three copies of this petition for writ of certiorari were served on the Attorney General of the State of Georgia, by placing them in the United States mail, first class postage prepaid, addressed as follows:

Office of the Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

This the 22nd day of December, 1987.



MELVIN S. NASH
Attorney for Petitioner

APPENDIX

In the Court of Appeals of Georgia

74773. PENDLETON v. THE STATE

(D-133)

DEEN, Presiding Judge.

During the early morning hours of January 8, 1986, a Cobb County police officer observed the vehicle driven by the appellant, Walter Pendleton, cross over the lane marks several times and change lanes twice without giving signals. The officer stopped the vehicle and, after noticing a strong odor of alcohol about Pendleton, administered a series of field sobriety tests, including an alconsensor, to Pendleton. Having failed these tests, Pendleton was then placed under arrest and transported to the station; shortly afterwards, an

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intoximeter test indicated a blood alcohol content of .20 percent. He was charged, tried, and convicted of driving under the influence, driving with a blood alcohol content of .12 or greater, and failure to maintain a proper lane. The trial court merged the two driving under the influence counts and sentenced Pendleton to serve 12 months' imprisonment, followed by 12 months' probation, and to pay a $1000 fine.

1. Pivotal to this appeal are three jury instructions given by the trial court. (1) After instructing the jury on the presumptions concerning blood alcohol content contained in OCGA § 40-6-392(b)(1)-(3), the trial court then informed the jury that no presumption was involved if it found that

Pendleton's blood alcohol content was .12 percent or greater; rather, in such a circumstance, the jury would have to find him guilty of driving with an unlawful blood alcohol content. (2) The trial court also charged that impaired driving ability is not a factor necessary to constitute a violation of OCGA § 40-6-391(a)(4). (3) Lastly, the trial court instructed the jury that "the alconsensor is used as an initial screening device to aid the police officer. It is not the state administered test the police officers ask the defendant to take. Further, the test results as to the alconsensor are given in the form of positive or negative."

Trial counsel for the appellant neither objected to nor made

reservations about these instructions, in response to the trial court's specific inquiry, and any objections were consequently waived. Harper v. State, 180 Ga. App. 20 (348 SE2d 318) (1986). Nevertheless, present counsel for the appellant contends that these jury instructions were bad, and that the trial counsel's failure to object demonstrated his ineffective assistance.

Concerning the main charge on blood alcohol content, notwithstanding this court's previous approval of essentially the same instruction in Turrentine v. State, 176 Ga. App. 145 (2) (355 SE2d 630) (1985), the appellant asserts that this charge (1) violates the constitutional principle that the jury shall be the judges of the law and the facts; (2)

is inconsistent and conflicting, not to mention improper and insufficient; and (3) was impermissibly confusing to the jurors. He contends that the charge on impaired driving ability, although taken directly from Lester v. State, 253 Ga. 235, 237 (320 SE2d 142) (1984), in effect instructed the jury to presume the defendant's blood alcohol level if the state was unable to establish this fact, and was impermissibly burden-shifting. Further, in the appellant's mind, the charge on the alconsensor was an impermissible comment on the evidence.

These contentions make little sense, and have even less merit. The jury charges were correct statements of law and fit the evidence, and the failure of the appellant's trial counsel to

assert frivolous objections to these charges certainly did not demonstrate ineffective assistance of counsel.

2. On the morning of (but prior to) the trial, the state disclosed to the appellant its intention to submit evidence of two prior convictions for driving under the influence in aggravation of sentencing. The sole objection raised during the actual sentencing hearing was that one of the prior convictions was too stale to consider. The appellant now contends that the trial court erred in considering the prior convictions because (1) the state did not comply with Rule 31.1 of the Uniform Rules of State Court, and (2) the state failed to show that the appellant either was represented by counsel or validly

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waived representation at the times of the prior convictions. These present objections were waived by the appellant's trial counsel, see McDuffie v. Jones, 248 Ga. 544 (283 SE2d 601) (1981), but for the edification of the appellant's present counsel it should be noted that Rule 31.1 of the Uniform Rules of State Court has nothing to do with tendering evidence in aggravation of sentencing.[1]

---

[1]The appellant's counsel's contention that the state did not comply with the Uniform Rules of State Court is not merely incorrect; rather, it illustrates the difficulty of practicing what one preaches. Despite being granted two extensions of time to prepare a brief and enumeration of errors in this essentially frivolous appeal, the brief eventually filed by counsel was lengthy, disorganized, and violative of Rule 11 (a) of the Rules of the Court of Appeals.

The state was not even required to give pre-trial notice of its intention to present the prior convictions at the sentencing stage. Whisenhunt v. State, 172 Ga. App. 742 (324 SE2d 570) (1984).

3. There is no merit to the appellant's contention that he was denied a fair trial because it was discovered after the trial that one of the bailiffs was the step-father of the state's main witness, and this relationship conflicted with the bailiff's duty not to communicate with the jury. First of all, the witness in question was hardly the state's main witness; he was merely the police officer who had served as back-up to the arresting officer, and who did not even appear on the scene until the appellant had been arrested. Secondly,

there is no substantiation whatsoever of the allegation of a familial relationship between the witness and the bailiff. Lastly, it is only where a communication from the bailiff to the jury is shown that the state must rebut a presumed harm, and in this case there was not even an allegation, much less a showing, of any communication. See Mercer v. State, 169 Ga. App. 723 (314 SE2d 729) (1984).

4. The appellant contends that the sentence imposed by the trial court was excessive when compared to the punishment received by others convicted of like offenses. OCGA §§ 17-10-1 and 17-10-2 allow a trial court to sentence a defendant to any amount of time within the limits provided by the legislature.

See Hiers v. State, 179 Ga. App. 181 (345 SE2d 900) (1986). The sentence in this case was within the statutory limits, and any complaints regarding the sentence should have been addressed to the appropriate sentence review panel. Hammond v. State, 157 Ga. App. 647 (278 SE2d 188) (1981).

5. The appellant also contends that the verdict is contrary to law because the trial court failed to charge the jury on intent; that the verdict is contrary to the evidence because of improperly admitted evidence; and that the verdict is contrary to the weight of the evidence. To reject the first "contrary," we need only point out that the trial court did charge on intent. We are unable to discern any merit in the

second "contrary" because, rather than specifying what evidence was improperly admitted, the appellant merely quotes testimony from the hearing on the motion for new trial criticizing the jury instructions. Concerning the third "contrary," the evidence was sufficient to authorize a rational trier of fact to find the appellant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). Thus, contrary to the appellant's contentions, the verdict is not infirm.

Judgment affirmed. Birdsong, C. J., and Pope, J., concur.

COURT OF APPEALS

OF THE STATE OF GEORGIA

Atlanta, September 29, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

74773. Walter K. Pendleton v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(Victoria McLaughlin)

CLERK

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta (Oct 28, 1987)

Case No. 45116. Pendleton v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk